Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1662

W. W. BLACKBURN AND JERRY BLACKBURN,
Individually and d/b/a Tiny Blackburn Agency,
Petitioners,

VS.

CRUM AND FORSTER, WESTCHESTER FIRE INSURANCE COMPANY, THE NORTH RIVER INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, COMMONWEALTH COUNTY MUTUAL INS. CO., U. S. FIRE INSURANCE CO. AND FLOYD WEST & COMPANY

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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May 16, 1980

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reasons for Denying the Petition	3
I. The Decision Below Is Clearly Correct	3
II. There Is No Conflict of Decisions	5
Conclusion	7
Certificate of Service	8

CITATIONS
Cases

	Page
Ackerman-Chillingworth v. Pacific Electrical Contractors Association, 579 F.2d 484 (9th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979)	6
Beltronics, Inc. v. Eberline Instrument Corp., 509 F.2d 1316 (10th Cir. 1974), *cert. denied,* 421 U.S. 1000 (1975)	6
Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975), *cert. denied,* 425 U.S. 936 (1976)	6
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)	4
Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975)	6
Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977)	4
E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973)	6
Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979)	6
Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127 (3d Cir. 1978)	6
Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970)	6
Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	5-6
Moore v. James H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977)	6
Mutual Fund Investors, Inc. v. Putnam Management Co., Inc., 553 F.2d 620 (9th Cir. 1977)	6
Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958)	4

	Page
Oreck Corp. v. Whirlpool Corp., 563 F.2d 54 (2d Cir. 1977), *cert. denied,* 439 U.S. 946 (1978)	6
St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531 (1978)	2
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	5-7
Silver v. New York Stock Exchange, 196 F. Supp. 209 (S.D.N.Y. 1961)	7
Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979)	6
Snyder v. Massachusetts, 291 U.S. 97 (1934)	3
United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)	6
White Motor Co. v. United States, 372 U.S. 253 (1963)	4, 6
Worthen Bank & Trust Co. v. National Bank-Americard, Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974)	6
Yoder Brothers, Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977)	4

Statutes

Sherman Act, 15 U.S.C. § 1	2
McCarran-Ferguson Act, 15 U.S.C. § 1012	2
28 U.S.C. § 1254(1)	2

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 611 F.2d 102. The order of the United States District Court for the Northern District of Texas is not reported. Both decisions are reproduced in the Appendix of the Petition. Although containing several minor omissions and typographical errors, the decisions as reproduced by Petitioners fairly reflect the holdings of the courts below. However, the trial court judge is the Honorable Robert M. Hill, not "R. Thomas Hill." (Petition p. A-11).

JURISDICTION

Respondents do not dispute the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The issue presented to the Court is quite narrow. It involves only the factual application of the per se rule of illegality under Section 1 of the Sherman Act, 15 U.S.C. § 1, to the unique circumstances of this case:

> 1. Did the action of the Respondents (hereinafter "Defendants") in terminating their insurance agency relationship with Petitioners (hereinafter "Plaintiffs") constitute a per se violation of Section 1 of the Sherman Act?

This case does *not* involve interpretation of the "business of insurance" exception to the Sherman Act as set out in Section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012, and as applied by this Court in *St. Paul Fire & Marine Insurance Co. v. Barry,* 438 U.S. 531 (1978). The courts below have not relied on that exception in dismissing the antitrust claim of Plaintiffs. Instead, this case has been decided on the merits by determining that no Sherman Act violation has occurred.

This case does *not* involve review of a Sherman Act violation under the "rule of reason" analysis. Plaintiffs apparently have conceded that they cannot produce evidence of anticompetitive intent or effect in this case to establish an antitrust violation under the rule of reason.

STATEMENT OF THE CASE

The opinion of the Court of Appeals correctly states the facts, taken in the light most favorable to Plaintiffs, as established by the summary judgment evidence in this case.

Basically, this case involves the termination of an insurance agency agreement by a group of related insurance companies (having common ownership and management) because of misconduct by the agency. In short, Plaintiffs were terminated by Defendants for issuing a fire insurance policy after the fire loss had occurred.

Plaintiffs have alleged an illegal boycott by Defendants in canceling their agency agreement. After almost two years of discovery and a full evidentiary hearing, the District Court granted Defendants' Motion for Summary Judgment on the ground that the termination of Plaintiffs was not a violation of the Sherman Act under either the per se rule or a rule of reason analysis. The Court of Appeals for the Fifth Circuit affirmed.

As noted by the Fifth Circut, Plaintiffs have pending in Texas state court an action for breach of contract arising out of the same termination made the basis of the antitrust claim. 611 F.2d at 103 n.3.

REASONS FOR DENYING THE PETITION

I.

The Decision Below Is Clearly Correct

Although "group boycotts" may be considered per se violations of the antitrust laws, certain analysis is required before that label can be applied. Accordingly, in the words of Justice Cardozo, we must not be ruled by the "tyranny of labels" under which "another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Snyder v. Massachusetts,* 291 U.S. 97, 114 (1934).

This admonition against the "tyranny of labels" is especially applicable in analyzing antitrust claims such as the

one at bar. As noted by the Fifth Circuit in *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1364 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977):

> To label an arrangement a group boycott, however, is merely to state a conclusion. In order to determine whether or not the label fits, it is necessary to ascertain whether the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a naked restraint of trade.

The per se rules were established to outlaw anticompetitive conduct which is a "naked restraint of trade." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Before the challenged conduct is termed per se illegal, the courts must determine whether its purpose and effect are inherently anticompetitive. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977).

The courts below correctly refused to apply the per se rule in this case because there is absolutely no factual showing of any anticompetitiveness in connection with the Defendants' actions.

The record in this case effectively rebutted the existence of any anticompetitive purpose of, or effect from, the termination of the Plaintiffs in this case. The Agency-Company Agreement between the Plaintiffs and Defendants was terminated as a result of the Plaintiffs' unsatisfactory conduct. That Plaintiffs wrote a fire insurance policy attempting to bind one of the Defendants after the fire loss had occurred constituted ample business justification for the Defendants' actions in this case. No anticompetitive animus could be shown.

Likewise, the summary judgment proof demonstrated no anticompetitive effect. If anything, interbrand competition was enhanced after the termination as Plaintiffs became agents for one of Defendants' competitors.

II.
There Is No Conflict of Decisions

Without regard to competition, Plaintiffs contend that the per se rule should apply in this case based on *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

However, *Klor's* and *Silver* are materially distinguishable from the case at bar. The critical factual difference stems from the competitive position of the alleged boycotters. As correctly noted by the Court of Appeals in this case, both *Klor's* and *Silver* involved boycotts in which at least some of the conspirators were on the same level of competition as the plaintiff. The alleged boycott in this case contains no such horizontal aspect.

In *Klor's*, the refusal to deal involved the participation of many entities throughout the distribution chain of home appliance products. In particular, a key conspirator in the boycott of the plaintiff was Broadway-Hale Stores, Inc., a direct retail competitor of the plaintiff. Because of the inherent anticompetitive purpose and effect involved when a competitor is eliminated, that conspiracy was held to be per se illegal.

In contrast, none of the alleged boycotters in the present case are on the same competitive level as, or in any way directly compete with, the Plaintiffs. Because of the lack of this horizontal aspect, it cannot be said that the termination of the Plaintiffs was inherently anticompetitive, either in purpose or effect. Thus, the basis for applying the per se rule in *Klor's* is clearly absent in this case.

While Plaintiffs complain that the Court of Appeals misapplied the *Klor's* holding, no authority is cited or argument made in support of that position. (Petition pp. 6-7). To the contrary, the opinions of this Court and the lower courts consistently interpret the per se rule of *Klor's* as applying to boycotts with horizontal aspects.[1]

Likewise, the reasons for applying the per se rule in *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), are not present in the case at bar. Plaintiffs incorrectly state that *Silver* involved no horizontal conspiracy. (Petition p. 7). However, the facts show that *Silver* involved a classic combination of traders operating at a single level of distribution to exclude a direct competitor from the market. The boycotting entity in *Silver,* the New York Stock Exchange, was comprised of competing securities dealers, as

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[1]*E.g., United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 372-73 (1967); *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963); *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1178 n.18 (D.C. Cir. 1979); *Harold Friedman, Inc. v. Thorofare Markets, Inc.,* 587 F.2d 127, 142 n.57 (3d Cir. 1978); *Gough v. Rossmoor Corp.,* 585 F.2d 381, 388 (9th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979); *Ackerman-Chillingworth v. Pacific Electrical Contractors Association,* 579 F.2d 484, 490 n.7 (9th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979); *Oreck Corp. v. Whirlpool Corp.,* 563 F.2d 54, 58 (2d Cir. 1977), *cert. denied,* 439 U.S. 946 (1978); *Mutual Fund Investors, Inc. v. Putnam Management Co., Inc.,* 553 F.2d 620, 626 (9th Cir. 1977); *Moore v. James H. Matthews & Co.,* 550 F.2d 1207, 1220 (9th Cir. 1977); *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338, 1346 n.13 (3d Cir. 1975); *Bowen v. New York News, Inc.,* 522 F.2d 1242, 1257 (2d Cir. 1975), *cert. denied,* 425 U.S. 936 (1976); *Beltronics, Inc. v. Eberline Instrument Corp.,* 509 F.2d 1316, 1320 (10th Cir. 1974), *cert. denied,* 421 U.S. 1000 (1975); *Worthen Bank & Trust Co. v. National BankAmericard, Inc.,* 485 F.2d 119, 127 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974); *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee,* 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); *Industrial Building Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336, 1341-42 (9th Cir. 1970).

made clear in the District Court's opinion. *Silver v. New York Stock Exchange,* 196 F. Supp. 209, 211 (S.D.N.Y. 1961). Consequently, when the Exchange terminated the plaintiff's communication connections, and thereby forced him out of business, it was acting on behalf of its members, the competing dealers. In fact, *Silver* has only horizontal aspects, since there was no boycott by an entity at a different level of the distribution chain.

Accordingly, the courts below have faithfully followed the decisions of this Court in disposing of this case.

CONCLUSION

Plaintiffs have made no showing of any special or important reason for granting writ of certiorari in this case. The courts below correctly applied well-settled law to the unique facts of this case. The decisions of the courts below are, in all respects, consistent with the opinions of this Court and all Courts of Appeals. Accordingly, the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ernest R. Higginbotham, one of the counsel for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the nineteenth day of May, 1980, I served the foregoing BRIEF FOR RESPONDENTS IN OPPOSITION on Petitioners by depositing in a United States post office three (3) copies thereof, with first class postage prepaid, duly addressed to John Wright, Esq., and George McCall, Esq., P.O. Box 1777, Grand Prairie, Texas 75051, counsel for Petitioners.

Ernest R. Higginbotham